No. 79-216

In the Supreme Court of the United States

OCTOBER TERM, 1978

PETER V. PAPPAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

ROBERT CRAIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS IN OPPOSITION TO BRIEF FOR THE UNITED STATES

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioners Peter V. Pappas and Robert Craig, Defendants-Appellants in the Court below, submit this Reply Brief in response to the Brief of the United States in Op-

position to the Petitions for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW.

The Opinion below is set forth verbatim in the Petition. (App. 1-6.)

It is reported at 602 F. 2d 131 (7th Cir. 1979).

JURISDICTION.

The decision below was filed on July 11th, 1979.

The Petition here was filed August 9th, 1979.

The Government's brief in opposition was due on October 15th, 1979, but was filed thereafter.

This Reply is filed *instanter*.

The jurisdiction of this Supreme Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Petition 79-216 presented Eight Questions for Review (Pet. 2-4), but the Government Brief recasts them into one brief, restrictive "Question".

Petitioners reiterate the same Eight Questions for Review by the Court.

STATEMENT.

Petitioners detailed the pertinent facts in their Statement. (Pet. 5-9). The Government Brief neither refutes nor objects to the Petitioners' Statement. Instead, the Government Brief submits its own "Statement"—a version that does not address itself to the Questions here, and a version that includes extraneous tangential matters. In commenting about the $30,000 fund (Gov. Br. 3), the Government volunteers unnecessarily and erroneously that ". . . Petitioner Pappas received several thousand dollars before distributing the *rest* to the legislators." (Emphasis added). The Indictment here (74 Cr 879) charged that those funds were received by legislators. It did *not* charge that Petitioner Pappas retained any portion of that fund. No indictment charged income tax evasions. This extraneous statement does not bear upon the Questions for Review and thus are inappropriate.

PETITIONERS' ARGUMENT IN REPLY.

The Petition detailed Eleven separate Reasons supporting a grant of this Petition for a Writ of Certiorari. (Pet. 10-37). The Government chose not to respond to each Reason—and instead prefaced with a general statement, four "arguments". (Gov. Br. 3-8). Petitioners reply as follows:

Reply to Government's Prefatory Statement:

A. First, the Government urges that ". . . there is no claim here of knowing use of perjured testimony . . ." (Gov. Br. 4, para. 1). At this time, that is correct. However, it is also immaterial.

Noting that the Government does not deny the omissions by its witnesses cited in the Petition, an omission of pertinent facts, a lie of omission is as prejudicial as a perjured statement, whether there is perjury or not.

Assistant United States Attorney Stone, a Government Witness and prosecutor, testified in detail about interviewing Informant Pete Pappas. This occurred in September, 1973, and his 1976 testimony supported the claim of "prior consent" to tape. But the direct examination, and the responses to cross-examination studiously omitted pertinent facts in Stone's personal possession. Stone failed to detail

his secret interviews with McBride—a key witness with the McBride "hearsay". (Pet. 19). Stone failed to reveal the existence of the IRS LOCKER and of the LOGS thereof and the existence of the tapes in that locker and of the "backup" tapes. Stone failed to reveal that he had ordered that "copies" of tapes in the locker be prepared for release to Professor Weiss. (Pet. 28).

There is now no explanation by the Government why these omissions occurred. It obviously was prejudicial—and an unnecessary omission—in derogation of due process.

B. The Government, conceding that evidence was suppressed and omitted, now argues that the Government did not suppress "exculpatory" evidence. (Gov. Br. 4, Para. 1).

First, this ignores that there is evidence still being suppressed and it's nature—whether exculpatory or inculpatory—is unknown. Secondly, whether evidence is or is not exculpatory is a jury's prerogative.

Petitioners are not restricted to exculpatory evidence in any event. Rule 16 Motions were duly made. In response, the Government produced some tape recordings, thus admitting recognition that Rule 16 demands required production of the tapings. Knowingly, the government suppressed other tapes and other documents. Now the Government unconscionably argues that the Petitioners did not claim either knowing use of perjury or suppression of "exculpatory" evidence.

The "knowing" suppression of evidence (in *knowing* violation of a Court Order of production of evidence) was the very tool used to frustrate the defense demands and to frustrate making that claim now, of knowing use of perjury and of knowing use of exculpatory evidence.

The tapes were the cornerstone of the Government's Case and the Government chose to suppress some of them

along with various documents. Whether this evidence is or is not exculpatory evades the full brunt of the Petitioners' position. Petitioners have stressed that the suppressed evidence so tainted the "ZERO" tapes, that a new trial is mandated. The tapes presented, were the sole and independent third-party evidence of the conversations, since the Informant did not corroborate them. Without the tapes, the case would have fared differently.

Reply to Government Argument No. 1: (Gov. Br. 4-5).

The Government responds to the Petitioners' contention that Professor Weiss examined only "copies" of tapes rather than originals. Professor Weiss had testified that if he had examined only copies, that his tests were a nullity. (Pet. 12-15, Exhibits 23-31)

The Government argues that since Informant Pete Pappas testified that the "ZERO" tapes were accurate, that this rebuts any fault in the Weiss tests. (Gov. Br. 5). This ignores that the Informant never listened to the original 1973 tapes, and that in 1976, he listened to "copies" of the "ZERO" tapes.

The Government also now ignores that the Informant was unaware of the *other* nine tapes in the IRS evidence locker, and that the Informant was also unaware that Stone had ordered that copies of the tapes in the locker be made for release to Professor Weiss.

As to the Informant's recollection in 1976, of his 1973 conversations, it should be noted that the Informant did not testify in 1976, as to the words missing from Tape 101-0, nor even detect their absence. On one hand, the Government urges that in 1973, the Informant advised in detail, the contents of that tape—but then in 1976, his failure to so testify is to be ignored. His 1976 recollection

is not material as to whether Weiss examined copies or originals, and is faulted by his non-recollection.

In addition, the Government relies upon the Seventh Circuit Opinion in 1977, when affirming the original conviction, at 573 F. 2d 478-9. The Government urges that the said affirmance establishes the integrity and authenticity of the tapes. This ignores that the suppressed evidence was still suppressed and never considered by the Seventh Circuit. Hence, its opinion is not the "law of the case" on this point. It is viable Question and issue, and now before this Court.

Finally, the Government concedes that Stone ordered that copies of tapes be made for delivery to Professor Weiss. It also concedes that the new documents revealed this now for the first time. Now the Government suggests that this new evidence alone does not establish that Weiss received only copies and did not receive the original tapes. (Gov. Br. 4.) It should be noted that Weiss himself did not know whether the tapes were copies or originals. The new evidence is the only evidence—it establishes that copies were made for the specific purpose of delivering them to Weiss. This evidence is more probative than mere conjecture.

Reply to Government Argument No. 2: (Gov. Br. 4-5)

This relates to the "missing words". Kell-Greenan's 1973 Report detailed words they heard on a copy of the tape of the September 27th, 1973 conversation that are not on Tape 101-0 of the same conversation—the government's court exhibit. (Pet. 15-17, Pet. Exh. 14).

The Government concedes that Kell-Greenan prepared and filed that Report after listening to the tape, but argues that their overhearing was supplemented by information

from Informant Pete Pappas as to portions of the tape that were "*unintelligible*". This is a non-explanation.

Kell-Greenan reported "intelligible" words—reporting what *they* heard. The Informant never heard *that* Kell-Greenan tape in 1973, nor even the original tape. It is inconceivable that the Informant's input as to any "unintelligible" portions of that tape affects "intelligible" portions.

The copy of the Kell-Greenan tape is still missing, as is its transcript. Only their written Report remains—a report by experienced investigators reporting intelligible and audible words.

Those words are still missing from Tape 101-0--without explanation.

Tape 101-0 is obviously conclusively faulted. The omissions of evidence, and the continued suppression of evidence supports the Petitioners. Only reversal will reach the truth and assure the fair trial and the due process due the defendants.

Reply to Government Argument No. 3. (Gov. Br. 6-7)

This relates to the "backup" tapes made secretly and simultaneously with those made with the recorders in the possession of the Informant. (Pet. 23-31, Exhibits 18-26).

First, the Government urges that a pretrial document advising that 1973 conversations had been "monitored and recorded", was a clue of the simultaneous use of the radio transmitter and of recordings of the transmissions.

The Government ignores that the prosecutors themselves supplemented that report—with ostensibly all of the evidence of what had been so "monitored and recorded". The

Government produced *only* the "ZERO" Tapes. They omitted any reference to and failed to produce the "backup" tapes. The Government has conceded their suppression. Thus, that pretrial clue was but a tip of an iceberg—one that never surfaced.

Secondly, it should be noted that now, the Government declined to resubmit its arguments below. Below, the Government urged that since it had never *denied* using the radio transmitters, that the lack of such a denial was a revelation that in fact that the transmitters had been used. Obviously that was a nonsequitur. It still is. (Pet. 25).

Lastly, the Government argues that the Petitioners have ". . . made no showing that the 'backup' tapes differ from the originals . . .". That is true, and the government suppression made that true. The defense never had the "backup" tapes—the "original" tapes were never produced. The Government did not even attempt to prove a chain of custody linking the original 1973 tapes to the 1976 "ZERO" tapes. (Pet. 21-23).

Below, the Government opposed an evidentiary hearing, and even failed to voluntarily release the "backup" tapes for an *in camera* inspection by court. If that had occurred —then a comparison could have been made. It should be provided for now.

Reply to Government Argument No. 4: (Gov. Br. 7-8)

This relates to the McBride "hearsay" Reason for granting the Writ. (Pet. 18, 19, 20, 26). McBride's "hearsay" was the linchpin of the Government's case. (Pet. 8-9). The suppressed evidence revealed the one secret interview of McBride, plus two other still undisclosed interviews—all in August, 1973. One of the interviewers was Assistant United States Attorney Stone, a trial witness for the Government.

The Government, in limiting its argument to the "obstruction of justice" issue, ignores that the suppression of that one document and of the other still suppressed documents completely frustrated the defense rights to full cross-examination and of confrontation of the witnesses who quoted McBride's "hearsay" liberally, with impunity.

Petitioners point out that the denial of their rights of confrontation is a due process denial. (Pet. 26-7). The defendants need not now prove want of prejudice. Rather, the Government must prove strictly, that the denial below was "harmless". The Government abandoned that argument before the Seventh Circuit. It is still before this Court, (Pet. 26-7), and a valid reason for the grant of the Writ.

Reply to Government's Footnote re: "Caceres": (Gov. fn 5, page 8)

Petitioners' Reason No. 10 argued that the Exclusionary Rule should not be applied here. (Pet. 31-34). The Government limited its Answer to the cited footnote.

However, the footnote is not responsive to the arguments posed by the Petition. Petitioners reiterate their Reason No. 10, that *Caceres* should be limited to it's factual situation involving an IRS investigator taping an ongoing crime —a bribe attempt. It should not be extended here, where a United States Attorney is directing the taping of past crimes or events. The non-compliance by a federal attorney is hardly akin to that of an IRS auditor coming under this Court's Lopez holding.[1] The United States Attorney's non-compliance is not shielded by the "Lopez" umbrella, since the Informant did not corroborate the tapes.

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[1] *Lopez* v. *U.S.*, 373 U.S. 427 (1966); *U.S.* v. *Caceres*, ---- U.S. ----, 59 L.Ed.2d 733 (1979).

CONCLUSION

Petitioners submit that a Writ of Certiorari should be issued.

Respectfully submitted,

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